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Supreme Court, U.S.
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No. 03-1488

IN THE

***SUPREME COURT OF THE UNITED STATES***

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ULYSSES TORY, ET. AL.

*Petitioners,*

v.

JOHNNIE L. COCHRAN, JR.

*Respondent.*

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ON WRIT OF CERTIORARI TO
THE COURT OF APPEAL OF THE STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT, DIVISION ONE

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# BRIEF OF AMICUS CURIAE THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION

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In support of the Petitioners
Request for Reversal

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## STATEMENT OF INTEREST OF AMICUS CURIAE

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press against threats in many forms. The Center has participated actively in the litigation of First Amendment issues, and has filed *amicus curiae* briefs in the United States Supreme Court, the Federal Courts of Appeal, and in numerous state courts. Consent to file in this Court was granted by all the parties.

## NATURE OF THE CASE AND STATEMENT OF FACTS

Nearly 20 years ago, noted Los Angeles lawyer Johnnie Cochran, Jr. represented Ulysses Tory in a civil rights suit. At some point in that litigation, Cochran withdrew as Tory's lawyer. In the late 1990s, Tory and others, including his wife, began picketing Cochran's office and the Los Angeles Superior Court building carrying signs bearing various statements. Tory did not personally carry all the signs, and several of the signs made no mention of Cochran's name. The placards that did mention Cochran by name criticized his handling of the case, questioned his ability as an attorney, and demanded the return of money Tory felt Cochran owed him. Cochran successfully sued Tory for libel and invasion of privacy but, instead of awarding him damages, a judge issued an injunction ordering Tory and "all persons acting in



concert with him" to never again display a sign or even speak about Cochran — favorably or otherwise — in a public place.

The California Court of Appeal upheld the injunction, emphasizing that it was aimed at "redressing private wrongs" rather than suppressing speech about public matters of concern. It is that decision that is now before this Court.

## SUMMARY OF ARGUMENT

The judgment of the court below sustains a classic prior restraint on speech that conveys views on issues of public concern, and, for that reason, is highly suspect under this Court's clear and consistent First Amendment rulings. Although not all expression is constitutionally exempt from injunctive relief, see e.g., *Madsen v. Women's Health Center*, 512 U.S. 753 (1994), the conditions under which this Court has occasionally permitted such relief differ sharply from the present case in two vital respects.

First, none of the exceptional interests that have been held to warrant injunctive relief are present here. There is, for example, no urgent need to protect ingress or egress in the exercise of a constitutionally protected right, cf. *Madsen*, 512 U.S. 767-68, or to

maintain an orderly electoral process near polling sites, cf. *Burson v. Freeman*, 504 U.S. 191, 208-09 (1992), or to preserve privacy in the environs of a residence, cf. *Frisby v. Schultz*, 487 U.S.474, 484 (1988).

Second, the injunction that is challenged here reflects few, if any, of the strictures observed by courts that have permissibly enjoined speech. This injunction is not, for example, narrowly tailored to reach only clearly unprotected speech, nor is it strictly limited in time, nor does it target only those persons who have engaged directly in the activity or expression that warrants judicial intervention. These flaws, among other shortcomings of this decree, do not meet this Court's high standards for injunctive relief against speech. Indeed, the central premise of the judgment below that courts may enjoin defamatory statements—is inapposite under the circumstances. In this case, most, if not all, of the enjoined statements were not actionably defamatory, and the record lacks any proof by the acknowledged public-figure plaintiff that the statements were made with actual malice, thus rendering the plaintiff constitutionally ineligible for even the lesser remedy of



money damages. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

Finally, *amicus* urges that the court below failed independently to review the record with anything approaching the standard of care required by this Court's ruling in *Bose v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984). Although the court of appeal "assum[ed] that this is a case in which we must review the evidence de novo," no such review was undertaken; instead, the court seems simply to have relied uncritically on the superior court's *ipse dixit* that "[u]ncontroverted evidence establishes" the proof of actual malice that is essential to penalizing or restraining speech about a public figure. *Cochran v. Tory*, 2003 WL 22451378 at *4 (Cal. App. 2d Oct. 29, 2003).

## I. INJUNCTIVE RELIEF WAS UNWARRANTED UNDER THE CIRCUMSTANCES OF THIS CASE, AND CONTRAVENES THIS COURT'S FREE SPEECH JURISPRUDENCE.

"Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional

validity." *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *see also Near v. Minnesota*, 283 U.S. 697, 716 (1931). This Court has permitted the use of injunctions to prohibit expression only under the most unusual and exigent conditions. Where such relief ha. been allowed against expressive activity, it has been justified by compelling government interests. Furthermore, the scope, extent, and duration of injunctive relief that infringes upon speech have been scrupulously limited. The injunction in the present case is neither justified by a significant government interest nor is it tailored with sufficient precision to survive First Amendment scrutiny.

A. The injunction challenged here fails to serve a compelling interest.

A canvass of the few situations in which this Court has condoned injunctive relief against expression reveals a close nexus between such relief and vital public interests that could not be served through less drastic means.



In very special situations, for example, this Court has recognized an inescapable need to "reconcile [its] commitment to free speech with [its] commitment to other constitutional rights," *Burson*, 504 U.S. at 198. The countervailing interest in *Burson* was the right to vote, the untrammeled exercise of which might occasionally justify limiting campaign speech around polling sites on election day. Similarly, cases like *Madsen*, 512 U.S. at 753, recognize that limited injunctive relief may occasionally be justified to ensure the free exercise of the constitutionally protected right to make reproductive choices. This Court expressly reaffirmed that rationale in *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1996), when it sustained a limited injunction based on the compelling presence of a governmental interest in "protecting a woman's freedom to seek pregnancy-related services." *Id.* at 376.

Likewise, when free-speech rights collided with the government's substantial interest in ensuring equal opportunity in employment, this Court saw fit to sustain an injunction against sex-

designated "help wanted" advertisements. *See Pittsburgh Press v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973).

In each of these cases, the impelling force behind creating an exception to this Court's abhorrence for prior restraint was a clear recognition that protecting a constitutional or statutory interest of a very high order warranted such intervention. The Court should take this opportunity to correct any misapprehension on the part of lower courts about the reach of these injunction-sustaining precedents to defamation actions. *See, e.g., Retail Credit Co. v. Russell*, 234 Ga. 765, 778-79, 218 S.E.2d 54, 62-63 (Ga. 1975) (citing *Pittsburgh Press* to support a holding that an injunction preventing libelous statements by a credit reporting agency was not an unconstitutional prior restraint on expression). In so doing, the Court would limit the reach of injunctions on speech to circumstances in which the countervailing government interest is more substantial than the concern for shielding a public figure from potential reputational injury.

This limiting principle is consistent with the other exceptional instances in which this Court has justified injunctive relief against



expressive activity. For example, this Court has on several occasions recognized that protecting the privacy of health professionals against threatening and intrusive activities near their homes may warrant limited injunctive relief. *See Madsen*, 512 U.S. at 765, *cf. Frisby*, 487 U.S. at 484. Such decrees have, however, been sustained only to the extent necessary to ensure the recognized interests.

Interests of national security also occasionally warrant limited injunctive relief. In *Near*, 283 U.S. at 716, this Court recognized that "[n]o one would question but that government might prevent actual obstruction to its recruiting service or publication of the sailing dates of transports and location of troops"—the latter being the very situation that Justice Brennan envisioned in his concurring opinion in *New York Times Co. v. United States*, 403 U.S. at 726, as the one possible basis for a prior restraint against a publication. This interest has been recognized as affording possible justification for prohibitions on picketing on or near a military base, as in *Greer v. Spock*, 424 U.S. 828, 838 (1976), and on demonstrating in the

immediate vicinity of a foreign embassy or United Nations mission, *Boos v. Barry*, 485 U.S. 312 (1988).

What is striking about the present case is the complete absence of any comparably urgent basis for the broad injunctive relief that has been granted and sustained by the California courts. Surely there is no issue of national security or international comity here. Whatever might have been the situation had similar picketing occurred in the immediate environs of Respondent Cochran's home, the inquiry remains purely speculative here because the target activity occurred entirely in the vicinity of a commercial office and not in a residential area. Similarly irrelevant is conjecture about picketing or demonstration that might have physically blocked ingress to or egress from that office building, or might have deterred prospective clients and others from entering or leaving the building. Indeed, the circumstances of this case offer no parallel whatever to any of the situations in which this Court has found warrant for enjoining expressive activity to protect a basic individual interest or to serve a vital public interest. At most, the premise for injunctive relief here is that the statements Petitioner



has made about Respondent are unflattering, embarrassing, and possibly harmful to reputation. No amount of such statements would justify the drastic remedy the California courts have imposed.

B. <u>The challenged injunction fails to meet First Amendment standards in its scope, duration, and precision.</u>

Even if exceptional circumstances might have warranted the limited use of injunctive relief, the actual decree issued by the superior court far exceeds constitutionally imposed standards in several crucial respects. For one, its duration is unlimited. This Court has consistently distinguished between brief or temporary restraints and those which are either permanent by their terms, *Alexander v. United States*, 509 U.S. 544, 550 (1993), or which are effectively permanent despite superficially limiting language, *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 (1971). Where the scope of an injunction is more than temporary, and extends beyond a brief time period, this Court has been especially skeptical of such intervention, see, e.g., *Alexander*, 509

U.S. at 550. The injunction challenged here leaves no ambiguity about its duration, for it "permanently enjoins" the target expressive activity.

Moreover, the injunction in this case falls far short of the narrow tailoring which this Court's rulings consistently demand. Even if the terms of this decree reached only actionably defamatory statements about Respondent and his professional status, it would still be problematic on several grounds. The actual order in this case is, however, unimaginably broader. Its coverage is not limited to Petitioner and other persons who have actually engaged in the offensive activity, but reaches a potentially limitless array of unnamed "agents, representatives, and all persons acting in concert . . ." Nor is the scope of this order confined to statements that are actually or potentially defamatory – or, for that matter, even to comments unfavorable toward the Respondent. Thus, if Petitioner wished to display a laudatory statement about Respondent, it too would be indiscriminately banned without proof that any legally cognizable interest was involved.



C. <u>The challenged injunction bans speech, much of which is protected by the First Amendment</u>.

The decree entered by the California courts is even more seriously flawed for a wholly different reason. Any injunction issued against actionably defamatory speech would be highly suspect, if only because the victim of such calumny has adequate legal recourse through money damages. Even the possible validity of such an order is, however, of no value to the present case. Not only is the challenged injunction not limited by its terms to defamatory statements, but, in fact, many of the statements to which it has been applied would fail even in a civil libel suit to meet the standard of actionable defamation about a public figure, and thus would not warrant even money damages, much less injunctive relief. Two distinct factors support that conclusion.

For one, many of the statements targeted by this injunction simply lack the essentially factual element that makes them potentially actionable as defamation. This Court has consistently recognized that many types of unwelcome—even offensive and opprobrious—statements about another person are not defamatory.

The examples are many and varied: referring to the negotiating posture of an aggressive real estate agent as "blackmail," *Greenbelt Coop. Pub. Ass'n v. Bresler*, 398 U.S. 6, 13-14 (1970), accusing a non-striking worker as a "traitor" to the union, *National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (1974), or impugning the morality of a prominent evangelist through a tasteless parody, *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988). In these and myriad other situations, courts have recognized that much offensive speech is not necessarily defamation, even if the speech may harm a person's reputation.

So it is with many, indeed most, of the statements that Petitioner has displayed in this case. The words are disrespectful and offensive, beyond doubt, and they may even threaten Respondent's reputation in some quarters. But, almost without exception, these statements constitute the type of "rhetorical hyperbole" this Court has cautioned that a contentious society must tolerate. *Greenbelt Coop. Pub. Ass'n*, 396 U.S. at 13-14. Thus, given the breadth of the actual decree is this case, it would be inappropriate to speculate on the validity of an injunction narrowly



confined to the few of Petitioner's statements that do contain the essentially factual quality that most of them lack.

There is a second and equally fatal flaw. Respondent is, beyond any possible doubt, a prominent public figure. As such, he would be required to establish "actual malice" in order to recover damages in a civil suit for any allegedly defamatory statement. *See New York Times*, 376 U.S. at 279-80. Injunctive relief is surely no more readily available than a monetary judgement without proof of deliberate falsehood or reckless disregard of truth or falsity. Yet the record in the superior court contains none of the requisite proof on this vital issue. Indeed, with respect to most of the "non-factual" statements, such proof would be analytically unavailable, and its absence is thus hardly surprising. Even for the few statements that might be factual enough to invite a libel suit, no findings were made to support the essential demonstration of malice. Such a finding would have been theoretically possible, though elusive, because no indicia of actual malice appear in the record.

## II. THE CALIFORNIA COURT OF APPEAL FAILED TO CONDUCT THE INDEPENDENT REVIEW OF THE FACTUAL RECORD THAT THIS COURT REQUIRES IN CASES INVOLVING A POTENTIAL INFRINGMENT OF THE RIGHT OF FREE SPEECH.

The principle that a permanent injunction of speech must be narrowly tailored follows logically from this Court's mandate that, in cases involving restrictions on speech, an appellate court must review the facts of the case de novo. *Bose*, 466 U.S. at 505. Such independent review is necessary "because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace," and an appellate court must decide "whether a given course of conduct falls on the near or the far side of the line of constitutional protection." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 567 (1995) (citing *Bose*, 466 U.S. at 503); *see also In re George T.*, 33 Cal. 4th 620, 632, 93 P.3d 1007, 1013 (Cal. 2004). In cases where a trial court has found speech to be unprotected, this Court "has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category



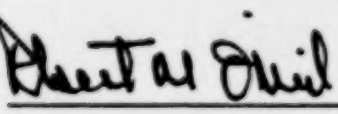
*within acceptably narrow limits* in an effort to ensure that protected expression will not be inhibited." *Bose*, 466 U.S. at 50[illegible] (emphasis added). It would be ironic indeed if this Court required the precision that independent review of the facts entails in separating protected from unprotected speech but did not demand the same precision in formulating the remedy of an injunction against the unprotected speech. Moreover, in the instant case, it does not appear that the California Court of Appeal conducted the required independent review of the facts. Although the lower court stated that it "assum[es] that this is a case in which we must review the evidence de novo to determine whether it supports the trial court's finding of actual malice," *Cochran v. Tory*, 2003 WL 22451378 at *4 (Cal. App. 2d Oct. 29, 2003), the appellate court failed to identify the facts that establish such a state of mind. Rather, the lower court merely states that "[u]ncontroverted evidence establishes . . . that Tory knew his statements were false." *Id.* Nowhere in the opinion did the court identify this "uncontroverted evidence" or explain how it establishes proof of Tory's knowledge concerning the veracity of his speech—a vital element in proving

defamation against a public figure. *See New York Times*, 376 U.S. at 279-80.

## CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully urges this Court to reverse the judgment of the California Court of Appeal.

Respectfully submitted,



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